UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TAMEKA SIMMONS,

Plaintiff,

v. **10cv8990 (JSR) (RLE)**

AKIN GUMP STRAUSS HAUER & FELD LLP,

Defendant.
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DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS WITH RESPECT TO COUNTS II, IV, VI, AND VIII OF THE AMENDED COMPLAINT

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DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS WITH RESPECT TO COUNTS II, IV, VI, AND VIII OF THE AMENDED COMPLAINT

Defendant Akin Gump Strauss Hauer & Feld LLP ("Akin Gump"), through undersigned counsel, respectfully submits this Reply in support of its Motion for Judgment on the Pleadings with respect to Plaintiff's Retaliation Claims.[1] Plaintiff's Opposition fails to acknowledge the clear and settled requirement that retaliation claims must plead materially adverse injury or harm. Indeed, Plaintiff's own cases confirm that point. Plaintiff then concedes that the Amended Complaint's slim allegation that Akin Gump initially refused, before providing her with counsel (in a matter in which she admits there was no allegation of wrongdoing by her), does not meet this standard; she attempts to rely upon a litany of allegations not found anywhere in the Amended Complaint. That tactic does not avoid dismissal of the Amended Complaint. In addition, Plaintiff argues that this Circuit would recognize causation, based only upon the filing of an EEOC Charge followed by an "initial" refusal eight months later to provide her with counsel (on an unrelated matter). She is wrong. Where, as here, the only evidence of a causal connection plead in the Amended Complaint is temporal, eight months cannot establish causation, as a matter of law.

[1] As defined in Akin Gump's Memorandum of Law at page 1.

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I. PARAGRAPH 44 OF THE AMENDED COMPLAINT DOES NOT PLEAD AN ADVERSE ACTION AS A MATTER OF LAW.

Plaintiff does not contest that the sole allegation of alleged adverse action is found in Paragraph 44 of the Amended Complaint, which states that after having received a Notice of Right to Sue, and over eight months after filing her EEOC Charge, Plaintiff received a call on October 12, 2010, from "various governmental entities" inquiring about matters she worked on at Akin Gump. Amended Complaint ¶ 44. Plaintiff alleges she did not have advance notice of the government's interest in such matters. *Id.* She alleges that Akin Gump refused her "initial request" to provide her with counsel, but then did so. *Id.* In that interim period, she consulted the New York Bar Ethics Hotline and her own counsel. *Id.*[2]

A. Plaintiff Ignores the Standard for an Adverse Action.

Employees are protected only from "retaliation that produces an injury or harm." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006). It must be "materially adverse." *Id.* at 68. Plaintiff ignores this critical requirement despite the fact that the Second Circuit in *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010), a case upon which she relies, explains these requirements of material adversity and injury or harm in detail:

> Actions are "materially adverse" if they are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." . . . by requiring a showing of *material* adversity, *White* preserves the principle that Title VII "does not set forth 'a general civility code for the American workplace.'". . . Thus, "[t]he antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm."

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[2] While the Amended Complaint curiously omits how much time elapsed between her "initial request" for counsel and Akin Gump's agreement to provide it, it is conceded Akin Gump did so before December 1, 2010, when she filed this action. *See* Original Complaint at ¶ 44. Indeed, while not necessary to consider for resolution of this Motion, Akin Gump agreed to do so on October 13, 2010, less than 24 hours after the "initial request." *See infra* at fn 5.

Id. (emphasis by court) (internal citation omitted).[3]

Likewise, in another of Plaintiff's cases, *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997), the Second Circuit affirmed the lower court's grant of summary judgment for the employer because the plaintiff had failed to demonstrate any injury or harm to his reputation. *See id.* ("We are not moved by Wanamaker's conclusory, unsupported claims that the loss of these services had an injurious effect on his reputation in the legal community.").

Plaintiff's remaining cases regarding post-employment retaliation involve former employers taking specific actions directly impacting future employment prospects or sullying reputations. Those cases only highlight the slim and immaterial allegation of adverse action in Paragraph 44 of the Amended Complaint.[4]

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[3] *Hicks* is most helpful in contrast to this case because, in *Hicks*, the retaliatory conduct involved objective harm and injury, including a formal reprimand and shortened off duty time. Plaintiff also cites a number of cases which hold that post-employment retaliatory behavior can be actionable – a point which Akin Gump does not contest.

[4] *See Kreinik v. Showbran Photo, Inc.*, No. 02 Civ. 1172 (RMB)(DF), 2003 WL 22339268, at *7 (S.D.N.Y. Oct. 14, 2003) (defendant's legal action against plaintiff "could impact on [sic] Kreinik's personal and professional reputation"); *Gonzalez v. Bratton*, 147 F. Supp. 2d 180, 196 (S.D.N.Y. 2001) (explaining that "the sort of retaliatory conduct that would naturally create major obstacles for a former employee in obtaining future employment in her field is actionable under this statute" and holding that "Witkowich's involvement in the NYPD's initiating against Gonzalez a felony charge of criminal impersonation of a police officer . . . can be considered an adverse action against Gonzalez that would unquestionably impact negatively her subsequent ability to obtain gainful employment") (emphasis added), *aff'd*, 48 F. App'x 363 (2d Cir. 2002); *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 178-79 (2d Cir. 2005) (vacating dismissal on summary judgment of retaliation claim based on a withdrawal of an employment offer after plaintiff's former supervisor falsely advised her prospective employer that she had a lawsuit pending against her former employer); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1054-55 (2d Cir. 1978) (complaint alleging employer's refusal to give plaintiff a letter of recommendation and making disparaging and untrue statements about plaintiff to her prospective employers sufficient for retaliation claim); *EEOC v. Die Fliedermaus, LLC*, 77 F. Supp. 2d 460, 464 (S.D.N.Y. 1999) (allegations of retaliation were sufficient to survive the pleading stage where the complaint alleged public

Plaintiff trivializes the numerous cases cited in Defendant's Memorandum of Law, which follow *Burlington* and support dismissal of this retaliation claim premised entirely on an alleged "initial" refusal to provide counsel. *See* Def's Mem. at 7-8 and authority cited, e.g. *MacGregor v. DePaul Univ.*, No. 1:10-cv-00107, 2010 WL 4167965, at *6 (N.D. Ill. Oct. 13, 2010) (granting motion to dismiss plaintiff's retaliation claim where plaintiff alleged that "the removal of her name [from her collection of photographs] resulted in a 'loss of prestige and recognition' that might have been useful for her career advancement" but she failed to "adequately allege[] why the removal of her name bears such significance that it qualifies as an adverse employment action, as opposed to a trivial harm or other minor annoyance"); *Baird v. Snowbarger*, Civ. A. No. 09-1091 (ESH), 2010 WL 3999000, at *9 (D.D.C. Oct. 13, 2010) (dismissing retaliation claim because "[e]ven assuming arguendo that Plaintiff suffered emotional distress as a result of the disparaging emails and remarks from her co-workers and litigation opponents, whether Plaintiff suffered objected harm. . . is speculative at best")

B. Plaintiff's Cases Regarding Denial of Representation Do Not Help Her.

Plaintiff relies upon three cases outside the Title VII context that supposedly stand for the proposition that "[t]he retaliatory failure to provide an attorney and failure to indemnify are both prohibited." Opposition at 9. Because the Amended Complaint itself concedes Akin Gump

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distribution of "derogatory fliers in employees' buildings and neighborhoods . . . [which] contained false, highly damaging statements about the employees, including, but not limited to, claims that the employees were prostitutes, drug dealers, and/or child molesters"); *Yankelevitz v. Cornell Univ.*, No. 95 Civ. 4593 (PKL), 1996 WL 447749, at *5 (S.D.N.Y. Aug. 7, 1996) (denying motion to strike retaliation claims because "[t]he allegations and implications of the counterclaim shed a negative light on plaintiff's professionalism and ethics in a profession that holds such qualities in high regard"); *Electchester Hous. Project, Inc. v. Rosa*, 225 A.D.2d 772, 773 (2d Dep't 1996) ("employer's act of contesting the complainant's right to receive unemployment insurance benefits, after assuring the complainant that she would be entitled to such benefits, solely because she filed a complaint with the SDHR was a disadvantaging employment action for the purpose [of] [sic] establishing a claim of retaliation").

"agree[d] to provide Plaintiff with counsel," (Amended Complaint ¶ 44) these cases are irrelevant. They are more so for other obvious reasons.

First, in *Econn v. Barclays Bank PLC*, 07 Civ. 2440, slip op. at 2-6, 15 (S.D.N.Y. May 10, 2010), an unpublished slip opinion, the court noted that the complaint alleged two contracts under which Barclays was obligated to pay plaintiff's legal fees, including the indemnification provision of Barclay's own by-laws. *Id.* Barclays paid the plaintiff's attorney's fees for over two years, but then abruptly discontinued such payments after the plaintiff's testimony before the SEC. *Id.* at 6-8. Under these circumstances, the court found that the plaintiff had sufficiently plead a retaliation claim under the Sarbanes-Oxley Act of 2002. *Id.* at 20. Plaintiff, in this case, pleads no legal obligation to provide fees (nor could she) nor a discontinuation or denial of fees.

Second, in *Bick v. City of New York*, No. 95 Civ. 8781, 1997 WL 381801, at * 5 (S.D.N.Y. July 10, 1997), the plaintiff asserted, among other things, a Section 1983 claim asserting that she was deprived of her civil rights when the defendants refused to provide her with legal representation or indemnification when she was included as a defendant in a lawsuit by the complaining police officer. The court declined to dismiss this Section 1983 claim, which it described as "alleging that she was denied representation and indemnification, as well as other benefits, on the basis of her gender and, perhaps, in retaliation for her refusal to alter her version of the facts to match that of the complaining officer." *Id.* at 6 (emphasis added). Neither denial of legal representation nor indemnification were the lynchpin of a retaliation claim, as here.

Finally, in *Mollfulleda v. Phillips*, 882 F. Supp. 689, 691-93 (N.D. Ill. 1994), the plaintiff sued the Chicago Health Clubs, Bally's, and an individual defendant – Phillips. Phillips then cross-claimed against Bally's and CHC for indemnity and retaliation. *Id.* Phillips alleged that the other defendants refused to indemnify him, despite the fact that they had indemnified employees in similar circumstances, in retaliation for his previously filed ADEA lawsuit. *Id*. at 695. The court held that Phillips would be statutorily entitled to indemnification if he was successful in his defense and denied the motion to dismiss Phillips' retaliation claim. *Id*. at 694-95. In that case, the legality of Phillips' actions was being challenged, permitting him to plead objective injury or harm arising from the failure to indemnify or pay attorney's fees. In contrast, Plaintiff here repeatedly admits that the governmental investigation involves no allegation of wrongdoing by her. *See* Opposition at 2, 4, 13. She was not at risk, like Phillips.

C. Plaintiff's New "Allegations" Must Be Ignored.

Conceding that Paragraph 44 of the Amended Complaint fails to allege any injury or harm to Plaintiff at all, Plaintiff's Opposition relies upon allegations that do not appear in the Amended Complaint. A motion for judgment on the pleadings "requires the court merely to determine 'whether the complaint itself is legally sufficient.'" *NRB Indus., Inc. v. R.A. Taylor & Assocs., Inc.*, No. 97 Civ. 181(JSR), 1998 WL 3638, at *1 n.1 (S.D.N.Y. Jan. 7, 1998) (Rakoff, J.) (granting motion for judgment on the pleadings) (internal citation omitted). As a result, all of the following new "allegations" should be ignored:

- Akin Gump immediately refused to provide Plaintiff with "independent counsel." Opposition at 1.
- "[A]ny lawyer, even one like plaintiff who is not accused of any wrongdoing, might incur [fear of professional or legal consequences] in responding to government inquiries without appropriate counsel." *Id.* at 1-2.
- Plaintiff would incur expenses in "immediately seeking independent legal advice." *Id.* at 2.
- "[O]n information and belief, defendant accords any of its attorneys whose knowledge is at issue in a government investigation – the costs of retaining unconflicted counsel." *Id.* at 2.

- "Plaintiff sought immediate advice, at her own expense, from her employment attorney." *Id.* at 4.
- Plaintiff was "surprise[d] and dismay[ed]." *Id.* at 4.
- Plaintiff was "[u]ncertain of how to proceed." *Id.* at 4.
- Plaintiff sought the advice of counsel "skilled in the issues involved in such investigations" and she did so "with the full knowledge of the expense that such representation would incur." *Id.* at 4.
- Plaintiff "also continued to seek advice from her employment attorney concerning how to respond to the government inquiry and Akin Gump's action." *Id.* at 4.
- "Akin Gump's refusal to provide counsel for the investigation thus had the additional deterrent effect of threatening significant legal bills during the ninety day window when plaintiff was weighing her decision to litigate her discrimination claims." *Id.* at 4.
- Plaintiff's employment attorney issued "repeated reminders" to Akin Gump of its ethical duties and obligations. *Id.* at 4.
- "Akin Gump's willful withholding of information concerning the investigation (Am. Complaint ¶ 44), ensured that plaintiff was unprepared and surprised." *Id.* at 13.
- "While the government investigation does not allege any wrongdoing by Simmons, plaintiff, like any prudent attorney, was nevertheless seriously concerned about affording counsel or, in the alternative, possibly violating her professional obligations, jeopardizing her career, and endangering her search for employment." *Id.* at 13.
- "The risk that Akin Gump's retaliatory acts posed to plaintiff's career and job search also provides additional evidence of material adversity." *Id.* at 13.[5]

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[5] There is a reason these facts do not appear in the Amended Complaint. Akin Gump "agree[d] to provide Plaintiff with counsel" (Amended Complaint at ¶ 44) within twenty-four hours of Plaintiff's contact by "various governmental entities" on October 12, 2010. *See* Kearns Declaration Ex. A. "On a motion to dismiss, the court may consider any written instrument attached to the complaint as an exhibit or any statements or documents incorporated in it by reference." *Yak v. Bank Brussels Lambert, BBL (USA) Holdings Inc.*, 252 F.3d 127, 130 (2d Cir. 2001) (internal citation and quotations omitted). *See also Levy ex rel. Immunogen Inc. v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 13 n.4, 18 (2d Cir. 2001) (affirming motion to dismiss).

II. THE AMENDED COMPLAINT DOES NOT ALLEGE CAUSATION.

The only evidence of a causal connection between Plaintiff's EEOC Charge and Akin Gump's alleged "initial" refusal to provide Plaintiff with counsel is temporal proximity. Accordingly, the temporal proximity must be "very close." *See* Def's Mem. at 11-12 and authority cited, *e.g.*, *McCormick v. Jackson*, No. 07 Civ. 7893 (JSR), 2008 WL 3891260, at *2 (S.D.N.Y. Aug. 21, 2008) (Rakoff, J.) (granting motion to dismiss plaintiff's retaliation claim for failure to plead causation) (internal citation and quotations omitted), *aff'd*, 365 F. App'x 247 (2d Cir. 2010). As this Court has noted, "the overwhelming majority of cases limit such time to less than six months, if not shorter." *Id*. *See also Reyes v. City Univ. of New York*, No. 06 Civ. 3639 (CM), 2007 WL 2186961, at *5 (S.D.N.Y. July 26, 2007) (granting motion to dismiss and holding that "[i]t is well settled in this Circuit that the protected activity must be followed closely by discriminatory treatment . . . and it is equally well settled that more than three or four months does not qualify as 'following closely'"); *Ragin v. E. Ramapo Cent. Sch. Dist.*, 05 Civ. 6496 (PGG), 2010 WL 1326779, at *24 (S.D.N.Y. Mar. 31, 2010) ("[M]any courts in this circuit have held that periods of two months or more defeat an inference of causation . . . . There is no reason to vary from that general rule here."). In this case, eight months passed between Plaintiff's filing of her EEOC Charge and the alleged "initial" refusal to provide her with counsel, which is far too long to support causation, a matter of law.

Plaintiff's cases regarding causal connection do not change this conclusion, because they expressly involve other evidence of retaliation - not just temporal proximity. *See e.g.*, *Faul v. Potter*, 355 F. App'x 527, 528 (2d Cir. 2009) (fifteen-month time lapse would "ordinarily undermine her claim, but Faul here relies instead, as she may, on other evidence of Sands's

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retaliatory animus").[6] Examples include: the same actor being involved in the protected activity and adverse action;[7] the process culminating in the adverse action was long and complicated;[8] retaliatory action sooner would have jeopardized the defendant's business; or the retaliatory conduct started immediately against others.[9] None of this is plead here. As in *Reyes*, where

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[6] *See also*, *Laudadio v. Johanns*, 677 F. Supp. 2d 590, 614 (E.D.N.Y. 2010) (a court "may overlook a longer gap in time between protected conduct and an adverse employment action where the pattern of retaliatory conduct begins soon after the protected activity and only culminates later in adverse action") (internal citation and quotations omitted); *Leung v. N.Y. Univ.*, No. 08 Civ. 5150 (GBD), 2010 WL 1372541, at * 5, n.3 (S.D.N.Y. Mar. 29, 2010) (six and ten month time lapses between the complaints and terminations were not "so great" so as to "necessarily preclude[] a finding of causal connection" where plaintiffs alleged adverse conduct against them prior to their termination that could "represent a continuing series of retaliatory acts culminating in plaintiffs' termination"); *Rehman v. State Univ. of N.Y. at Stony Brook*, 596 F. Supp. 2d 643, 648, 653 (E.D.N.Y. 2009) (protected activity and retaliation involved same actor and where plaintiff alleged that after his protected activity the disparate treatment about which he complained continued and he began to suffer retaliatory adverse actions culminating with his poor performance evaluation eight months after his protected activity); *Quinby v. WestLB AG*, No. 04 Civ. 7406, 2007 WL 1153994, at *13 (S.D.N.Y. Apr. 19, 2007) ("An eight month gap between the protected activity and the retaliation is usually insufficient to establish the requisite causal connection" but it was sufficient to survive summary judgment where, "she received an uncharacteristically poor performance review soon after" her protected activity, there was evidence that four months after her protected activity her supervisor sought a replacement for her, she was denied a bonus at the first available opportunity, and the protected activity and adverse actions involved the same actor).

[7] *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009) ("we find that the passage of only six months between the dismissal of Espinal's lawsuit and an allegedly retaliatory beating by officers, one of whom (Surber) was a defendant in the prior lawsuit, is sufficient to support an inference of a causal connection"); *Cronin v. St. Lawrence*, No. 08 Civ. 6346 (KMK), 2009 WL 2391861, at ** 1-2, 5 (S.D.N.Y. Aug. 5, 2009) (the protected activity and the adverse action involved the same actor); *Lindner v. Int'l Bus. Machs. Corp.*, No. 06 Civ. 4751 (RJS), 2008 WL 2461934, at **1-2, 7 (S.D.N.Y. June 18, 2008) (same); *McKenzie v. Nicholson*, No. 08 Civ. 0773 (AKT), 2009 WL 179253, at *5 (E.D.N.Y. Jan. 26, 2009) (same).

[8] *Batyreva v. N.Y. City Dep't of Educ.*, No. 07 Civ. 4544 (PAC)(DF), 2008 WL 4344583, at *14 (S.D.N.Y. Sept. 18, 2008) ("While standing alone, the 'temporal proximity' between the events might be insufficient to permit an inference of causal connection. . . . Plaintiff also alleges that the time lapse was due to the complexity of the various procedural requirements that Defendant had to comply with in order to terminate her . . . .") (internal citations omitted).

[9] *Bernhardt v. Interbank of N.Y.*, No. 92 CV 4550, 2009 WL 255992, at *6 (E.D.N.Y. Feb. 3, 2009) (eleven month period between protected activity and adverse action was sufficient to suggest causation where "[r]etaliatory action against the plaintiff at [the time of the protected activity] might have seriously jeopardized the viability of the fledgling institution"); *Grant v.*

"Plaintiff does not plead facts tending to show any direct retaliatory animus, the indirect temporal proximity approach, standing alone, is not enough to save the claim." *Id.* at 6.

CONCLUSION

Defendant Akin Gump, therefore, respectfully requests that the Court dismiss Counts II, IV, VI, and VIII of the Amended Complaint with prejudice.

DATED: January 28, 2011

Respectfully submitted,

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Bethlehem Steel Corp., 622 F.2d 43, 45-46 (2d Cir. 1980) (upholding judgment that Union retaliated against three ironworkers for their prosecution of charges against Bethlehem and the Union by referring them only to short-term work or no work at all and finding sufficient causal connection when one ironworker was denied work immediately upon the Union's receipt of notice of the EEOC Charge, the second was denied work beginning eight months after Union's receipt of notice of the EEOC Charge, and the third was denied work beginning nine months after the Union's receipt of the EEOC Charge).